SUPREME COURT, U. S.

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No. 73-1448

In the Supreme Court of the United States

OCTOBER TERM, 1973

SALVATORE C. PRESTA, JR., and MICHAEL ROMANELLI,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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In the Supreme Court of the United States

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NO.

SALVATORE C. PRESTA, JR., and MICHAEL ROMANELLI,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioners, Salvatore C. Presta, Jr., and Michael Romanelli, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on February 1, 1974 affirming the judgment of conviction earlier entered in the United States District Court for the Northern District of Illinois, Eastern Division. A Petition for Rehearing EN BANC was denied on March 1, 1974.

OPINION BELOW

The order affirming the judgment of the District Court is not recorded. It is reproduced as an appendix to this petition as is the order denying rehearing (Appendix A, infra).

JURISDICTION

The jurisdiction of this court is invoked under Title 28 United States Code, section 1254(1). The order of conviction affirming the District Court was entered on February 1, 1974. The petition for rehearing *en banc* was denied on March 1, 1974.

QUESTIONS PRESENTED

1) Whether a guilty plea conviction may stand where the trial court failed to adhere to the provisions of Rule 11,[1] Federal Rules of Criminal Procedure as interpreted by this court in *McCarthy* v. *United States,* 394 U.S. 459, 89 S.Ct. 1166 (1969).

a) Whether Rule 11 was violated where the trial judge failed to advise the petitioners that they could receive a consecutive sentence on their plea of guilty to indictment 72 CR 279 and that Count II of that indictment mandated a consecutive sentence.[2]

b) Whether Rule 11 was violated when the trial court determined during the guilty plea colloquy that the petitioners were without knowledge and did not understand the elements of 18 U.S.C.A. 1951.[3]

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[1] Federal Rules of Criminal Procedure, Rule 11, Appendix B, *infra.*

[2] 18 U.S.C.A. 924(c) is set forth in Appendix C, *infra.*

[3] 18 U.S.C.A. 1951 is set forth in Appendix D, *infra.*

c) Whether the trial court committed prejudicial error in entering judgments of conviction on a guilty plea absent inquiry as to any conflict of interest between these petitioners, a co-indictee-informer and the single attorney that represented the three (3) defendants.

2) Whether the trial court committed prejudicial error in refusing to allow these petitioners to withdraw their guilty pleas pursuant to Rule 32(d), when the petitioners moved to withdraw their guilty pleas almost seven (7) weeks before sentencing.

a) Whether the refusal of these petitioners to specifically set forth a defense in their motion and affidavit, to withdraw their guilty plea, justified the trial court in refusing to vacate the guilty pleas several weeks prior to the imposition of sentence. [4]

b) Where the several Federal Circuit Courts of Appeal split as to the proper interpretation of Rule 32(d) this court is justified in granting review to afford a proper interpretation of the application of Rule 32(d).

3) Whether guilty plea convictions should be affirmed where the defendants were jointly represented by a single attorney who also represented a co-indictee-informer in the same and subsequent indictments.

a) Whether the Sixth Amendment effective right to counsel was violated where a single attorney represented three defendants; one of whom became a Government informer after which the other defendants (petitioners before this court) suffered two (2) subsequent indictments on the information provided by the co-indictee.

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[4] Rule 32(d) is set forth verbatim in Point II, *infra*.

b) Whether the petitioners were denied their Fifth Amendment rights under due process of law where the petitioners were never granted any hearing to demonstrate that the indictments against them were the result of information supplied the Government by a co-indictee-informer at a time when the petitioners and the informer were represented, jointly, by the same attorney.

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the Constitution of the United States provides:

> "No person shall be . . . deprived of life, liberty or property, without due process of law . . ."

The Sixth Amendment to the Constitution of the United States provides:

> ". . . In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense . . ."

STATEMENT OF THE CASE

In March, 1972 these petitioners and others were charged in a three (3) count indictment alleging violations of 18 U.S.C.A. 1951 and 924(c).[5] The petitioners entered not guilty pleas on April 17, 1972. At that time they were represented by the same attorney. Enrico Presta, a brother of one of these petitioners was arraigned on the same date and was represented by the same attorney.

On May 30, 1972 Enrico Presta and the petitioners now before this court withdrew their earlier pleas of not guilty and entered guilty pleas to indictment 72 CR 279.

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[5] This indictment is set forth in Appendix E, *infra*.

On July 27, 1972 the petitioners filed their joint motion and an affidavit seeking leave to withdraw their May 30, 1972 guilty pleas alleging, inter alia, the prejudicial failure by the trial court to comply with Rule 11 of the Federal Rules of Criminal Procedure and a conflict of interest as between the petitioners, the co-indictee, Enrico Presta and their attorney.[6]

The motion to vacate the guilty pleas were denied, without hearing on September 12, 1972 and sentence was imposed on October 17, 1972.

Prior to the imposition of sentence, Salvatore Presta, addressed the trial court as follows:

> "Defendant Salvatore Presta: Your Honor, all I wanted was a trial, that is all, your Honor. My first attorney kept on telling me to plead guilty, plead guilty, which I didn't want to from the beginning.
>
> The Court: Was that Mr. Maloney?
>
> Defendant Salvatore Presta: Mr. Maloney.
>
> The Court: Well, I did go into the motion to withdraw the plea and I denied that, of course." (72 Cr 279, October 17, 1972; Tr. 8)

Salvatore Presta was sentenced to four (4) years in custody. Prior to imposing sentence on the Petitioner, Romanelli, the following appears of record:

> "The Court: Mr. Romanelli, what do you have to say in your own behalf?
>
> Defendant Romanelli: Your Honor, I have never been through anything like this before or anything. I honestly feel that my lawyer, Thomas Maloney, the first one—that I was misrepresented by him.
>
> The Court: We have gone over that already.
>
> Defendant Romanelli: Yes. But I just wanted to state my say on it." (id., Tr. 13)

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[6] The motion and affidavit are in Appendix F, *infra*.

The Petitioner, Romanelli, was then sentenced to a five (5) year term of imprisonment (id, Tr. 15). The sentence was to run concurrent on all three (3) counts (id, Tr. 15).

The Brother, Enrico Presta, was likewise sentenced on the same date and the following colloquy appears of record:

> "Mr. Maloney: We are ready, your Honor.
> Mr. Ackerman: Thank you, your Honor.
> The Court: What do you have to offer in mitigation on behalf of the defendant?
> Mr. Maloney: The fact that his cooperation with the Government, your Honor, and his prior life, I think, are things probably—I imagine everything else is contained in his presentence investigation report.
> The Court: Mr. Presta, what do you have to say in your own behalf?
> Defendant Enrico Presta: Your Honor, I did something wrong and I am sorry. I regret it. I got mixed up with the wrong people.
> The Court: Including your brother?
>
> • • •
>
> Mr. Griffin: Your Honor, I would indicate that Mr. Enrico Presta has been valuable both in this case and in the one before Judge Austin with the information he has provided the Government, and in a third investigation which we expect will result in an indictment.
>
> • • •
>
> Mr. Griffin: Though he is guilty, we think his culpability is less than the others. And his cooperation has been very helpful." (id, Tr. 16, 17)

Enrico Presta was sentenced to Two (2) years and fined $1,500.00 and his sentences were concurrent on each count. Prior to the imposition of this sentence the Court was reminded that Enrico Presta made no motion to vacate his guilty plea (id., Tr. 19)

The post-sentence events are shrouded with confusion. The forecast by the U.S. Atty. that the cooperation of Enrico Presta would lead to another indictment was more

than accurate. The forecast was fulfilled by the return of two (2) subsequent indictments charging the petitioners with separate offenses.

In indictments 72 CR 788 and 72 CR 796[7] both petitioners were charged wth separate acts alleging, inter alia, violations of 18 U.S.C.A. 1951. Both petitioners entered guilty pleas and received consecutive sentences to the sentence earlier imposed in 72 CR 279.

Lest there be no confusion in this court the appropriate dates of sentencing were as follows: Both petitioners were sentenced under Indictment 72 CR 279 on October 17, 1972 (Presta, four (4) years; Romanelli, Five (5) years, sentences concurrent on each of the three (3) counts in that indictment). On October 30, 1972 Presta was sentenced on Indictment 72 CR 788 and 796 to eight (8) years in custody; concurrent on each count in both indictments but consecutive to the four (4) year sentence under 72 CR 279; thus a total of twelve (12) years in custody. Romanelli was sentenced under 72 CR 788 and 796 to concurrent seven (7) year sentences on both indictments to run consecutive to the five (5) year sentence he received under 72 CR 279; thus a total of twelve (12) years in custody.

On October 27, 1972 the United States Attorney filed a motion before the trial court in 72 CR 279 requesting that the trial court dismiss Count II of that indictment because a consecutive sentence had to be imposed, but was not.

The petitioners are each serving twelve (12) year sentences and are in custody. They have yet to be afforded any hearing on any of the constitutional questions now before this court.

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[7] These indictments were reviewed in the consolidated appeal under 7th Circuit Court of Appeals Nos. 73-1250 and 73-1306.

REASONS FOR GRANTING WRIT

The questions posed in this petition are both substantial and meritorious. A guilty plea is a devastating waiver of an accused's constitutional rights. This court in *McCarthy* v. *U.S.*, 394 U.S. 459, 89 S. Ct. 1166 (1969) set forth the standards that must be adhered to in assuring that the constitutional rights of an accused may not be lightly waived. Both the District Court and the Court of Appeals either overlooked the instructions from this court or, have themselves now, set a standard that is unacceptable to this court. The result of strict adherence to Rule 11 takes little time, serves to effectuate the sound administration of justice and avoids questions such as these being brought to this court.

It is of utter necessity that this court now resolve the conflicts and confusion amongst the several federal circuits as to the proper application and standards with respect to Rule 32(d). There is absolutely no agreement among the several circuits as to the application and standards involving the use of this salutary rule.

The effective right to counsel has, at all times, been denied petitioners herein without so much as a hearing to resolve the troublesome question of a single attorney and multiple defendants with conflicting interests.

ARGUMENT

I.

The order affirming the conviction in 72 CR 279 (73-1250) was in total error. Either the Court of Appeals for the Seventh Circuit attempted to fashion a new "post-McCarthy" interpretation of Rule 11 of the Federal Rules of Criminal Procedure or they (The Court of Appeals) committed total error. Even prior to *McCarthy* v. *U.S.*, 394 U.S. 459, 89 S.Ct. 1166 (1969) this court reversed, PER CURIAM an appeal from the Fifth Circuit in *Marvel* v. *U.S.*, 380 U.S. 262, 85 S.Ct. 953 (1965) where the defendant was not advised as to the maximum sentence he would receive, or could receive, on a plea of guilty to an offense where the defendant was sentenced pursuant to 18 U.S.C.A. 5010(b) (Youth Correction Act). Almost, without exception, every Circuit Court of Appeals has vacated guilty pleas and allowed a defendant to plead anew where the maximum penalty was not told the defendant at the time the plea of guilty was entered. In accord, *Durant* v. *U.S.*, 410 F.2d 689 (1st Cir., 1969); *Bye* v. *U.S.*, 435 F.2d 177 (2nd Cir., 1970); *Barry* v. *U.S.*, 412 F.2d 189 (3rd Cir., 1969); *Harris* v. *U.S.*, 426 F.2d 99 (6th Cir., 1970); *U.S.* v. *Smith*, 440 F.2d 521 (7th Cir., 1971); *Jenkins* v. *U.S.*, 420 F.2d 433 (10th Cir., 1970). In each of these cases guilty pleas were vacated because the defendant was not advised that parole was "unavailable".

The Seventh Circuit Court of Appeals in *Marshall* v. *U.S.*, 431 F.2d 355 (7th Cir., 1970) adopts, sub nom., the "automatic prejudice rule that makes pleas of guilty invalid under Rule 11 where the defendant is not fully ad-

vised of the maximum penalties that may issue from the plea of guilty. In *Stetson* v. *U.S.*, 417 F.2d 1250 (7th Cir., 1969) the Seventh Circuit reversed and remanded with directions to give a full evidentiary hearing where the petitioner (Stetson) alleged in his 2255 Petition that his plea of guilty to a federal bank robbery offense (18 USCA section 2113) was less than voluntary.

The Petitioners filed their motion and affidavit to vacate the guilty plea on July 27, 1972. The motion was denied, absent hearing, on September 12, 1972 with the court finding, inter alia, that the plea was valid and the failure of the defendant-petitioners to set forth a defense foreclosed any further consideration of their motion (72 Cr 279; September 12, 1972; Tr. 9-16).

The court sentenced the petitioners on October 17, 1972 albeit, while accepting the plea the court failed to address each petitioner as to the actual elements of the offense charged (72 Cr 279; May 30, 1972; Tr. 8, 9, 10, 11, 12); failed to tell the petitioners what the maximum possible penalties were (id, 12) and particularly failed to inform each petitioner that their guilty plea to count two (2) of the indictment mandated a "consecutive sentence" (app. c, infra); yet further, the court totally failed to question each petitioner as to their satisfaction with their attorney, who, of course, as later events disclosed, simultaneously represented a co-indictee-informer (point 3, infra). It further appears from the transcripts that the trial court was unaware of the elements constituting the offenses charged in indictment 72 Cr 279 (app., d, infra, id. 10, 11), nor that count 2 of that indictment necessitated a consecutive sentence. The government attempted to cure this clear defect in the original guilty plea admonition when on October 27, 1972 the government moved to dismiss count 2

ten (10) days after sentence had already been imposed (72 Cr 279; October 27, 1972; Tr. 3, 4, 5). No hearing was offered the defendant-petitioners as to the voluntariness of the original plea which, now clearly, was based on patently false information. Query: Were the petitioners required to be present for this non-sentencing, as they must, of course, be for sentencing. Is non-sentencing a critical stage of a criminal proceeding, *cf.* *Mempa* v. *Rhay et al.*, 389 U.S. 128, 88 S.Ct. 254 (1967).

Can a guilty plea be knowing and voluntary when the court that accepted the plea was neither aware of the necessary elements comprising the offense(s) charged nor aware that a consecutive sentence was required.

The Court of Appeals failed to take into account any of the following:

a) The question of what "other promises" may have been involved (Tr. 6);

b) That only the non-appealing indictee, Enrico Presta discussed the "value *vel non*" of the articles set forth in the indictment[9] (Tr. 9);

c) Only the petitioner Romanelli replied to the court when inquiry from the trial judge related to the "interstate nature" of the offense. The petitioner Presta was neither asked nor did he respond and the Petitioner Romanelli disavowed knowledge of the "interstate" nature of the theft (Tr. 12).

The above, coupled with the admitted error in failing to direct the defendants to the maximum penalties they might receive demonstrate, beyond a doubt, the error or misapprehension by the Court of Appeals in affirming this conviction.

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[9] Indictment 72 CR 279 is set forth in Appendix E, *infra*.

Following their plea of guilty and long before imposition of sentence these petitioners, by motion and affidavit, moved to vacate their pleas of guilty. Their motion and affidavit were filed on the 27th day of July, 1972 (App. B, infra). The conflict of interests issue raised in the petitioners' motion and affidavit will be treated in Argument 3, infra. The Government opposed the withdrawal of the guilty pleas albeit at no time did they suggest any prejudice.

The Court of Appeals refused to follow the law of their Circuit in refusing to vacate the pleas of guilty. In *U.S. v. Smith*, supra, the 7th Circuit in reversing and remanding a narcotic conviction for the trial court's failure to advise the defendant (Smith) that he would be ineligible for parole recited:

> In so holding, we reiterate and follow our adoption of the rationale in Berry v. United States, *supra*, in Marshall v. United States, 7 Cir., 431 F.2d 355 (1970), which was concerned with the necessity of informing a defendant of the possibility of consecutive sentences under each count of the indictment pursuant to Rule 11. In that § 2255 proceeding, in speaking for our court Judge Kerner said, at 357-358:
>
> > "The Third Circuit in holding that the failure to apprise a defendant, pursuant to a plea of guilty, that the defendant would not be eligible for parole was failure to comply with the dictates of Rule 11, stated:
> >
> > > The mandate of Rule 11, before and after the 1966 amendment is designed to insure that the pleader is made aware of the outer limits of punishment. At the very least, this means that he must be apprised of the period of required incarceration * * *. When one enters a plea of guilty he should be told what

> is the worst to expect. At the plea he is entitled to no less—at sentence he should expect no more.
>
> Under such circumstances, the knowledge of ineligibility for parole is as necessary to an understanding of the plea as is the knowledge of the maximum sentence possible. Failure to impart this information constituted a failure to explain to the appellant the consequences of his plea. Berry v. United States, 412 F.2d 189, 192-193 (3d Cir. 1969).
>
> See also Durant v. United States, 410 F.2d 689 (1st Cir. 1969). We agree with the court's reasoning in *Berry* * * *." (440 F.2d at 526)

The "post *McCarthy*" cases addressing the issue of strict compliance with Rule 11 demonstrate the failure to advise the defendant of the "maximum penalty" vitiates the plea without a showing of manifest injustice, *U.S.* v. *Cantor,* 469 F.2d 435 (3rd Cir. 1972). In *Cantor,* supra, the 3rd Circuit Court of Appeals vacated a conviction and sentence with directions to allow the Defendant to plead anew where there was a question raised in the record as to whether the defendant "truly understood the elements necessary to prove the offenses charged in that indictment . . ." (Id., 469 F.2d at 438). The *Cantor* court noted "* * * a failure to scrupulously comply with Rule 11 will invalidate a plea without a showing of manifest injustice. McCarthy v. U.S. (citation omitted)" (469 F.2d at 437. In *U.S.* v. *Richardson,* 483 F.2d 516 (8th Cir., 1973) the Court of Appeals vacated a conviction and sentence following a guilty plea to a narcotics offense because, inter alia, there was no showing in the record that the defendant understood the nature of the "special parole" term which automatically followed a conviction under 21 USC 841(b)(1)(A) (id, 518). Interestingly, Richardson was granted the right to replead although at the time of sentencing the U.S. attorney "included the

special parole term in recitation concerning the possible sentence in the presence of the defendant, his counsel, and the judge" (483 F.2d at 519). Richardson, unlike the petitioners now before this court, was a previous federal offender who had earlier parole experience (id., 483 F.2d at 519). In *U.S. ex rel Hill* v. *U.S.*, 452 F.2d 664 (5th Cir., 1971) the Court of Appeals remanded for an evidentiary hearing a conviction under 18 USCA 2113(a) wherein the defendant contended he was not advised as to the maximum possible sentence he could receive on his guilty plea. In remanding, the 5th Circuit Court of Appeals stated:

> • • • The holding of the district court is contrary to this Court's holding in Tucker v. United States, 5th Cir. 1969, 409 F.2d 1291, where the record failed to show that a defendant was informed as to the maximum possible sentences he was facing "*before* he entered his pleas of guilty". (Emphasis ours) It is firmly established that a guilty plea is invalid as not being understandingly entered if the defendant does not know the maximum penalty possible for the offense. Marvel v. United States, 1965, 380 U.S. 262, 85 S.Ct. 953, 13 L.Ed.2d 960; Tucker v. United States, supra; United States v. Perwo, 5th Cir. 1970, 433 F.2d 1301. (452 F.2d at 665)

In *U.S.* v. *Blair,* 470 F.2d 331 (5th Cir., 1972, Cert. den., 93 S.Ct. 1536 (1973) a conviction for mail theft on a guilty plea of nolo contendere was remanded with directions to set aside the *Dunn* conviction unless the government could establish with "requisite certainty" that Dunn had knowledge of the maximum penalty possible on his plea. In remanding, the Court opined:

> . . . Obviously the maximum possible penalty for the offense is one of the most important consequences of a plea of guilty. Hill v. United States, 5 Cir., 1971, 452 F.2d 664; United States v. Perwo, 5 Cir., 1970,

433 F.2d 1291; Marvel v. United States, 1965, 380 U.S. 262, 85 S.Ct. 953, 13 L.Ed.2d 960, affirming 5 Cir., 335 F.2d 101; Tucker v. United States, 5 Cir., 1969, 409 F.2d 1291. That a plea has been made with full understanding of the consequences must appear affirmatively from the record. McCarthy v. United States, 1969, 394 U.S. 459, 89 S.Ct. 1166, 22 L.Ed.2d 418. Therefore, failure to inform the Defendant of the maximum sentence that may be imposed as a result of his plea vitiates its efficacy. *Hill, supra; Tucker, supra;* Fortia v. United States, 5 Cir., 1972, 456 F.2d 194; Berry v. United States, 3 Cir., 1969, 412 F.2d 189; Durant v. United States, 1 Cir., 1969, 410 F.2d 689; Combs v. United States, 9 Cir., 1968, 391 F.2d 1017; Pilkington v. United States, 4 Cir., 1964, 315 F.2d 204; Marshall v. United States, 7 Cir., 1970, 431 F.2d 355. (470 F.2d at 340)

In *Jones* v. *U.S.*, 440 F.2d 466 (2nd Cir., 1971) the Second Circuit remanded a 1968 bank robbery conviction to ascertain whether the guilty pleading petitioner knew a maximum sentence of twenty (20) years could be imposed although the petitioner was sentenced to thirteen (13) years. The Second Circuit found that "the maximum possible sentence is a consequence within the meaning of Rule 11 and that a guilty plea cannot be accepted under that Rule unless the court determines that the defendant is aware of the maximum penalty for the offense. . . ." (440 F.2d at 468)

The Petitioners invite attention to the American Bar Association Standards relating to pleas of guilty. A.B.A. Standards 1.4 read:

1.4 Defendant to be advised by court.

The court should not accept a plea of guilty or nolo contendere from a defendant without first addressing the defendant personally and

(a) determining that he understands the nature of the charge;

(b) informing him that by his plea of guilty or nolo contendere he waives his right to trial by jury; and

(c) informing him:

(i) of the maximum possible sentence on the charge, including that possible from consecutive sentences;

(ii) of the mandatory minimum sentence, if any, on the charge; and

(iii) when the offense charged is one for which a different or additional punishment is authorized by reason of the fact that the defendant has previously been convicted of an offense, that this fact may be established after his plea in the present action if he has been previously convicted, thereby subjecting him to such different or additional punishment.

Even a cursory review of the guilty pleas by the petitioners before this court reveal the utter failure to comply with Rule 11 as interpreted by this court in *McCarthy* v. *U.S.*, supra. The A.B.A. Standards, supra, likewise were violated and each petitioner respectfully prays that this court vacate the conviction and sentence imposed under 72 CR 279 and remand to the District Court with directions to allow them to plead anew.

II.

The Petitioner moved by motion and affidavit to withdraw their guilty plea almost three (3) months prior to the imposition of the sentence in 72 Cr 279.

Rule 32 (d) for the Federal Rules of Criminal Procedure so far as may be here applicable recites "A motion

to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended."

In 1927 this Court in *Kercheval* v. *U.S.*, 274 U.S. 220, 47 S.Ct. 582 (1927) stated:

> "But, on timely application, the court will vacate a plea of guilty shown to have been unfairly obtained or given through ignorance, fear or inadvertence. Such an application does not involve any question of guilt or innocence. Commonwealth v. Crapo, 212 Mass. 209, 98 N.E. 702. The Court in exercise of its discretion will permit one accused to substitute a plea of not guilty and have a trial if for any reason the granting of the privilege seems fair and just . . ." (47 S.Ct. at 583).

In 1972 this Court re-affirmed this proposition:

> "If a defendant moves to withdraw a guilty plea before judgment and if he states a reason for doing so, I think that he need not shoulder a further burden of proving the 'merit' of his reason at that time. Before judgment, the courts should show solicitude for a defendant who wishes to undo a waiver of all the constitutional rights that surround the right to trial —perhaps the most devastating waiver possible under our Constitution. Any requirement that a defendant prove the 'merit' of his reason for undoing this waiver would confuse the obvious difference between the withdrawal of a guilty plea before the Government has relied on the plea of its disadvantage, and a later challenge to such a plea, on appeal or collaterally, when the judgment is final and the government clearly has relied on the plea . . ." (*Dukes* v. *Warden*, 92 S.Ct. 1551 at 1555). Concurring opinion, Mr. Justice Stewart.

In *Dukes*, supra, this court reviewed a state conviction and thus, no question as to the application of Rule 32(d)

was involved. The trial court gave precious little consideration to the motions to vacate the guilty plea.

The motions and affidavit seeking leave to withdraw the guilty pleas were filed in the district court on July 27, 1972. The court denied the motions on September 12, 1972. In the colloquy on September 12, 1972, the co-indictee brother-informant's lawyer denied a conflict of interest existed in his representation. (72 CR 279, September 12, 1972; Tr. 9-16). But significantly he didn't reveal what information was proffered to the government by himself prior to this date, nor if this information was gained from the informant himself or the result of joint conferences among the defendants and their attorney. Moreover, no hearing was allowed to explore this very crucial fact as to the question of a knowledgeable plea. Furthermore, in not only refusing to allow a withdrawal of pleas the trial court, solely, and wrongly, declared:

> "Well, but you are at the 11th hour, Mr. Ackerman. If you can't set forth your defenses specifically, I do not think they are entitled to very much consideration." 72 Cr 279, Sept. 12, 1972 (Tr. 9-16)

Yet, nowise was it alleged that a trial would prejudice the government. In *Kercheval* v. *U.S.* (47 S.Ct. 582 at 583) this court stated succinctly:

> "Such an application does not involve question of guilt or innocence."

Any review of the decisions of the several Circuit Courts of Appeal leads to the inescapable conclusion that the utter confusion and division of opinions positively calls for the granting of the writ, if for no other reason, than to clarify when, and under what circumstances, Rule 32(d) has application.

In *Kadwell* v. *U.S.*, 315 F.2d 667 (9th Cir., 1963) a Dyer Act conviction was vacated after a motion to withdraw a guilty plea was denied by the district court and the following appears in the opinion:

> ". . . Accordingly, Rule 32(d) imposes no limitation upon the withdrawal of a guilty plea BEFORE sentence is imposed, and such leave should be freely allowed" (315 F.2d at 670; in accord *Poole* v. *U.S.*, 250 F.2d 396 (D.C. Cir., 1957) *Gearhart* v. *U.S.*, 272 F.2d 499 (D.C. Cir., 1959)).

Kadwell supra, cites with approval an early opinion of the 7th Circuit where a 2255 Petition resulted in the vacation of a sentence imposed three (3) years prior to the filing of the 2255 petition, *U.S.* v. *Davis*, 212 F.2d 264 (7th Cir., 1954). The Eighth Circuit finds that "guilt or innocence" is not relevant in determining the disposition of a motion to withdraw a guilty plea before sentencing, *Friedman* v. *U.S.*, 200 F.2d 690 (8th Cir., 1952).

In *Everett* v. *U.S.*, 336 F.2d 979 (D.C. Cir., 1964) a plea of guilty prior to sentencing was allowed to be vacated for "no reason other than the defendant wanted a trial on a charge of which (defendant) admitted his guilt" (336 F.2d at 982). In *U.S.* v. *Stayton*, 408 F.2d 559 (3rd Cir., 1969) the Court of Appeals reversed the refusal to vacate a pre-sentence motion to vacate a plea of guilty on a counterfeiting charge citing with approval the Fifth Circuit opinion in *Kirshberger* v. *U.S.*, 392 F.2d 782 (5th Cir., 1968). In *U.S.* v. *Stayton*, supra, the continuing guidelines were set forth in *Kercheval* v. *U.S.*, supra:

> ". . . Accordingly, Rule 32(d) imposes no limitation upon the withdrawal of a guilty plea BEFORE sentence is imposed, and such leave should be freely allowed" (315 F.2d at 670; in accord *Poole* v. *U.S.*, 250

F.2d 396 (D.C. Cir., 1957), *Gearhart* v. *U.S.*, 272 F.2d 499 (D.C. Cir., 1959).

In accord, *Everett* v. *U.S.*, 336 F.2d 979 (S.C., 1964); *Friedman* v. *U.S.*, 200 F.2d 690, (8th Cir., 1952). The Seventh Circuit has, by this decision, effectively destroyed whatever salutory value included in Rule 32(d).

An additional reason for this court granting review would, hopefully, be to formulate a rule or approach as to just what "standard" is applicable, when reviewing a presentence motion to withdraw a plea of guilty. A frequent commentary on 32(d) may be found in *U.S.* v. *Young,* 424 F.2d 1276 (3rd Cir., 1970), where the 3rd Circuit Court of Appeals, clearly and distinctly states "• • • The Rule does not articulate a standard governing the withdrawal of a plea on a motion BEFORE sentencing • • •" (424 F.2d at 1279).

The 9th circuit has a conflict within its own decisions. In *U.S.* v. *Youpee,* 419 F.2d 1340 (9th Cir., 1969) the Court of Appeals affirmed the refusal by the trial court to vacate a plea of guilty made by Youpee after Youpee had determined that he wanted to be treated as a "Juvenile" under 18 USC 5034. *Youpee* supra, incorrectly states

> • • • The roots of this rule are in justice and the concept of estoppel; the government will generally have suffered little harm prior to sentencing and thus withdrawal of a plea of guilty should be liberally granted before final sentencing. See Zaffarano v. United States, 330 F.2d 114, 115 (9th Cir. 1964) cert. den. 379 U.S. 825, 85 S.Ct. 52, 13 L.Ed.2d 35 (1964); 8A Moore's Federal Practice #32.07[2] at 32-52. (419 F.2d at 1343)

But see: *Poole* v. *U.S.*, 250 F.2d 396 (D.C. 1957).

As stated in *Glasser*, the right to trial by jury, is a bulwark of this republic. To plead guilty is to waive that very fundamental right, and the entire panalopy of rights that are concomitant with it. To irrevocably renounce that right is no small decision. It is suggested that Rule 11, and *McCarthy*, in recognizing the substantial waiver, are designed to assure that the waiver is fully protected: that is the defendant is guilty, did commit the crime as a matter of law, does know the consequences of his decision *fully*. It is further suggested that Rule 32(d) is further designed to protect the very fundamental rights accorded each and every individual accused. Rule 32(d) reads:

> A motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the course after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

This Court has made no explanation as to how this rule should be applied.

It appears the assumption is made in some circuits that the standard "manifest injustice" applies to both the first and second clause. This petitioner would suggest otherwise. The first clause reads essentially: "A motion to withdraw . . . may be made *only* before sentence is imposed . . . .:"; which would lead one to believe that as a point of privilege and the exercise of 6th amendment rights, one is entitled to withdraw his plea before sentencing. The second clause makes this clear. Following the semicolon it reads: ". . . ; *but* to correct manifest injustice . . .". It is clear that a strong standard of "manifest injustice" is to be applied only after sentence has been imposed on a plea of guilty. "Manifest Injustice" simply does not modify the first clause. To allow the lower courts

to exercise discretion without any guidelines defeats the twofold nature of Rule 32(d).

The Court of Appeals for the Second Circuit rules to the contrary in *U.S.* v. *Fernandez,* 428 F.2d 578 (2nd Cir., 1970) where relying only on other Second Circuit cases the court affirms the denial of a motion to vacate a guilty plea under Rule 32(d) although making no finding that to do so (vacate the guilty plea prior to sentencing) would prejudice the government. The Seventh Circuit by the order affirming the convictions in this case now aligns itself with the Second Circuit. In *U.S.* v. *Young,* 424 F.2d 1276 (3rd Cir., 1970) the Court of Appeals for the 3rd Circuit remanded a conviction and sentence imposed on a defendant who prior to the imposition of sentence had requested a withdrawal of his guilty plea. The Court opined:

> • • • The liberal rule for withdrawal of a guilty plea before sentence is consistent with the efficient administration of criminal justice. It reduces the number of appeals contesting the "knowing and voluntariness" of a guilty plea, and avoids the difficulties of disentangling such claims. It also ensures that a defendant is not denied a right to trial by jury unless he *clearly* waives it. (424 F.2d 1279, 1280)

The split in the Federal Circuit reviewing Rule 32(d) might well require this court to accept and review the question as to when, how and under what standards Rule 32(d) may be applied.

III.

The Sixth Amendment "effective right to counsel" was denied both petitioners before this court. The bald assertion is only meaningful in the context of the fractured status of the single attorney that represented these petitioners and the co-indictee, Enrico Presta.

The trial court never undertook any questioning of the defendants, viz-a-viz conflict of interest. The Second Circuit has recently considered this issue in *U.S.* v. *DeBerry*, ... F. 2d ....., (2nd Cir., 11/7/73). In reversing the narcotics conviction the Second Circuit opined:

> . . . It is obvious that a situation involving potential conflict arises frequently where the same attorney is representing two defendants. Thus it is a rule of practice in at least one circuit, and we understand in a number of district courts, always to have separate counsel for each defendant. Ford v. U.S., 379 F.2d 123 (D.C. Cir. 1967). At the same time, this court has held that "[t]he rule in this circuit is that some specific instance of prejudice, some real conflict of interest, resulting from a joint representation must be shown to exist before it can be said that an appellant has been denied the effective assistance of counsel." U.S. v. Lovano, 420 F.2d 769, 773 (2d Cir. 1970). See also Morgan v. U.S., 396 F.2d 110, 114 (2d Cir. 1968). Where no prejudice is shown the joint representation is not impermissible. U.S. v. Alberti, 470 F.2d at 881. . . . (*U.S.* v. *DeBerry*, ... F.2d ....., 1973.)

This Court only need look to the dictates of *Glasser* v. *U.S.*, 315 U.S. 60, 62 S.Ct. 457 (1942) for a recitation of what the Sixth Amendment right of counsel includes:

> * * * [15] There is yet another consideration. Glasser wished the benefit of the undivided assistance of counsel of his own choice. We think that such a desire on the part of an accused should be respected. Irrespective of any conflict of interest the additional burden of representing another party may conceivably impair counsel's effectiveness.
>
> [16-19] To determine the precise degree of prejudice sustained by Glasser as a result of the court's appointment of Stewart as counsel for Kretske is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to

the amount of prejudice arising from its denial. Cf. Snyder v. Massachusetts, 291 U.S. 97, 116, 54 S.Ct. 330, 336, 78 L.Ed. 674, 90 A.L.R. 575; Tumey v. Ohio, 273 U.S. 510, 535, 41 S.Ct. 437, 445, 71 L.Ed. 749, 50 A.L.R. 1243; Patton v. United States, 281 U.S. 276, 292, 50 S.Ct. 253, 256, 74 L.Ed. 854, 70 A.L.R. 263. And see McCandless v. United States, 298 U.S. 342, 347, 56 S.Ct. 764, 766, 80 L.Ed. 1205. (62 S.Ct. at 467)

Initially, the petitioners, Presta and Romanelli, as well as Enrico Presta, the brother of the petitioner were all represented by the same attorney.[11] After the guilty plea by these petitioners and E. Presta (May 30, 1972) Enrico Presta, without dispute, cooperated with the United States Attorney. During the pendency of this cooperation the petitioners were yet being represented by the same attorney as was the brother-informer, Enrico Presta. To suggest a lack of prejudice would be to utterly disregard the following colloquy:

"The Clerk: 72 CR 483, U.S. v. Salvatore Presta, Enrico Presta, Michael Romanelli, status report.

Mr. Griffin: Farrell Griffin on behalf of the Government, your Honor.

The Court: This is up for trial setting?

Mr. Ackerman: No, your Honor, it is up for a status call.

Mr. Griffin: Status and to set forth trial, your Honor.

The Court: What is the status? The status is it is set for trial, as I gather it.

Mr. Griffin: The arraignment took place on the 20th of June. Time for motions were set and no motions have been filed as of this time.

The Court: All right.

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[11] The last indictee in 72 Cr 279 was Donald R. Sheehy who was represented by Richard Devine, who had the same office address and suite number as did counsel for both Prestas and Romanelli, to wit: 7 S. Dearborn Street, suite 717, Chicago, Ill.

Mr. Griffin: At that time Mr. Maloney represented all defendants. Today Mr. Ackerman is appearing for the first time before this Court.

Mr. Ackerman: Allan Ackerman. I would ask leave of Court to file an appearance for Salvatore Presta and Michael Romanelli only. Mr. Maloney still represents Enrico Presta, who is a co-defendant.

The Court: With the understanding that the time for motions is past.

Mr. Ackerman: I would ask your Honor to give me five days.

The Court: That motion is denied. The matter is set forth for trial on October 16th.

Mr. Ackerman: I would ask your Honor for an order of this Court asking that Enrico Presta be available to take a statement. He is going to be a witness for the Government during the trial of this cause.

The Court: Who is Enrico Presta?

Mr. Maloney: He is one of the three defendants. He is the one that I represent.

The Court: What is this, some new procedure of discovery in criminal cases?

Mr. Ackerman: I would ask your Honor for an order of court so that I can take a statement from him or at least that he be made available.

Mr. Griffin: Your Honor, Mr. Enrico Presta is not in custody. He is the brother of Salvatore Presta. I think—

The Court: I never heard of such a procedure anyway, regardless of their relationship." (73-1250 and 1306 September 12, 1972, Supp. TR. 2, 3).

The petitioners were thus foreclosed from preparing for trial under indictment 72 CR 483. Little did it matter. This indictment was dismissed and two (2) new indictments were returned "after" Enrico Presta began cooperating with the government.[12] The petitioners do not

[12] The Petitioners, having never been granted any evidentiary hearing as to when Enrico Presta became an informer, are without ability to dispute the joint representations made by the government and Mr. Maloney that the date was on or about July 24, 1972.

know when Enrico Presta became an informer, or what revelations were made to the Government. The petitioners and Enrico Presta met often in their Attorney's office and which facts gleaned from these meetings were ones brought to the government by the informer can be left only to speculation: any hearings directed toward this question having been denied by both trial judges, although motions were made for hearings, so that the facts, whatever they might be, would come forth. Enrico Presta's role is absolutely clear:

> Court: My recollection is the Government one year. But the Court said it did consider his cooperation and imposed the two. (72 CR 279; Oct. 27, 1972, TR 7)

The circumstances of the abuse of joint representation, thus depriving a defendant of his absolute Sixth Amendment right to counsel are not without either review or reversal within the several Circuit Courts of Appeal.

In *U.S.* v. *Marshall,* 488 F.2d 1169 (9th Cir., 1973) the court reversed and remanded as to the defendant Marshall the finding that the joint representation of Marshall and the co-indictees, Eishhen and Morgan, by the same attorney (private counsel) was so totally conflicting that Marshall, although represented by retained counsel was denied his "effective right to counsel" (488 F2d 1193, 1194).

In *U.S.* v. *Foster,* 469 F.2d 1 (1st Cir., 1972), the Court affirmed a Narcotic conviction with the caveat that in future criminal litigation

> "* * * After the date of this opinion, it shall be the duty of the trial court, as early in the litigation as practicable, to comment on some of the risks confronted where defendants are jointly represented to insure that defendants are aware of such risks, and to inquire diligently whether they have discussed the risks with their attorney, and whether they under-

stand that they may retain separate counsel, or if qualified, may have such counsel appointed by the court and paid for by the government. For the time being, at least, we leave to the discretion of the trial court the exact time and form of the inquiry. There may be unusual circumstances where, to avoid the possibility of prejudicial disclosures to the prosecution, the court may exercise its discretion to pursue the inquiry with defendants and their counsel on the record but in chambers.

[9] If the court has carried out this duty of inquiry, then to the extent a defendant later attempts to attack his conviction on grounds of conflict of interest arising from joint representation he will bear a heavy burden indeed of persuading us that he was, for that reason, deprived of a fair trial." (469 Fed 2d at 4).

In *U.S.* v. *Pinc,* 452 F.2d 507 (5th Cir., 1971) the Court reversed and remanded a Dyer Act conviction where the same attorney represented both a husband and wife and the husband was denied effective right of counsel in violation of the Sixth Amendment because the Attorney could not "ethically" cross-examine the wife by virtue of the same attorney having represented the wife (452 F.2d at 508). In *Craig* v. *U.S.,* 217 F.2d 355 (6th Cir., 1954) the Court reversed an Income tax conviction because Craig was denied his right to effective counsel. Attorney Wasserman represented both Craig and a co-indictee at the trial and all parties felt, prior to trial that no conflict would develop, (Id., at 358). The Court of Appeals found otherwise and in reversing and remanding for a new trial stated:

"• • • In representing both defendants counsel undertook to perform a difficult, if not impossible, task. Whether the result would have been different if they had been in a position to devote their talents

unreservedly in the interest of Craig can not now be determined." (id. 358)

* * *

"The prejudice to a defendant from the failure to have the effective assistance of counsel results whether counsel is court appointed or selected by the accused. The right 'is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.' Glasser v. United States, supra, 315 U.S. 60, 76, 62 S.Ct. 457, 467, 86 L.Ed. 680." (217 F.2d at 359)

The ABA Standards regarding "the defense function," Standard 4.1, recites:

> The lawyers duty to investigate is not discharged by the accused's admission of guilt to him or by his stated desire to enter a guilty plea. The accused's belief that he is guilty in fact may often not coincide with the elements which must be proved in order to establish guilt in law. . . . The lawyers duty to determine, from knowledge of all the facts and applicable law, whether the prosecution can establish guilt *in law,* not in some moral sense. (Approved Draft, Commentary, pp. 226, 227.)

Thus, in guilty pleas where an accused takes the monumental step of waiving almost all of his constitutional rights and submits himself to the possibility of lengthy prison sentences and large fines it may be assumed, arguendo, that the defendant took the great step upon the advice of his counsel. If the advice of counsel be tainted because of conflicts of interest, or other reasons, this right to counsel under our Sixth Amendment has been clearly denied the guilty pleading defendant. The ABA Standard on conflict of interest is found in ABA Standard, defense function, 3.5 (b):

> The potential for conflict of interest in representing multiple defendants is so grave that ordinarily a

> lawyer should decline to act for more than one of several co-defendants except in unusual situations when, *after careful investigation,* it is clear that no conflict is likely to develop and when the several defendants give an *informed* consent to such multiple representation. p. 211

The denial of the precious Sixth Amendment "effective right to counsel" was fostered by the attorney jointly representing these petitioners and the informer-brother. The attorney filed no pre-trial motions in either 72 CR 279 or 72 CR 483. The objects of pre-trial discovery are, inter alia, to allow defense counsel to glean sufficient facts which allow him to make an informed judgment as to the interest of his client(s) in a criminal proceeding.[13]

The utter failure to file any pre-trial motions is, at best, suggestive of the lack of desire by defense counsel to acquaint himself with facts sufficient to determine even a possibility of conflict.

In this case a conflict of interest of the greatest magnitude occurred. The joint-defendant-co-indictee-brother became an informer and, sequentially, these petitioners were not only improperly denied an opportunity to stand trial, but were twice indicted thereafter on information supplied by their co-indictee and that information may well have come from joint conferences between these petitioners, their then counsel and the brother-informer. In *Hoffa* v. *U.S.,* 385 U.S. 293, 87 S.Ct. 408 (1966) this Court affirmed the conviction for the attempted bribery of jurors over the contention urged that the Government-informer was privy to conversations between Hoffa and his Attorneys. While agreeing that this would be a violation of the Sixth Amendment this Court found that both the

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[13] Rules 7(f) and 16 of the Federal Rules of Criminal Procedure.

findings of the district court and the Court of Appeals were abundant in the failure to disclose any such relevant facts (87 S.Ct. at 415, 416). In *Hoffa,* supra, the district court held a plenary hearing and gave Hoffa ample opportunity to demonstrate any facts upon which his contention could be sustained (87 S.Ct. at 415; 349 F.2d 20 at 39).[14] Unlike *Hoffa,* supra, these petitioners were totally denied any hearing wherein they, or either of them, were allowed to proffer any proof, or testimony, that the co-indictee-brother used information he gathered AT A TIME HE ALREADY WAS, OR INTENDED TO BE, A GOVERNMENT INFORMER to further the government's case(s) against these petitioners. These petitioners are without ability to further their contention that the single attorney and/or Enrico Presta gave information to the government which resulted in the two (2) later indictments because they were totally denied any hearings. One statement by the Assistant U.S. Attorney substantially corroborates the prejudice to these petitioners from the denial of any such hearing.

> Mr. Griffin: Your Honor, I would indicate that Mr. Enrico Presta has been valuable both in this case and in the one before Judge Austin with the information he has provided the Government, and in a third investigation which we expect will result in an indictment. (72 Cr 279, October 17, 1972)

This revelation gives added substance to the claim of these petitioners because they were both, thereafter, indicted in 72 CR 788 and 72 CR 796 for offenses involving alleged violation of 18 USCA 1951.[15]

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[14] *U.S.* v. *Hoffa,* 349 F.2d 20 (6th Cir. 1965).

[15] These were reviewed by the Court of appeals as 73-1250 and 1306, respectively (App. 1, *infra.*)

The effective right to counsel as per the Sixth Amendment was so totally lacking that, at the very least, this Court should vacate the guilty pleas and remand the cause to the district court for an evidentiary hearing to allow each petitioner to present such evidence as he is able to demonstrate that the indictments were the product of "taint", viz-a-viz; that the information leading to indictments 72 Cr 788 and 796 cases came, in whole or in part, from Enrico Presta as a result of information gleaned in the joint conferences between the single attorney, Maloney, and the petitioners now before this court. The truth may then be gained, nothing may be lost.

CONCLUSION

For the foregoing reasons the petitioners respectfully pray this court issue its writ of certiorari to the United States Court of Appeals for the Seventh Circuit and grant review on the issues submitted to this court.

Respectfully submitted,

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